86-274

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

GEORGE SARKISIAN, JOHN SARKISIAN, NORMAN PRESKITT, SARCO INDUSTRIES, INC., CHARLOTTE STREET BUILDERS, INC., and SARKISIAN BROTHERS, INC.,

Petitioners,

against

THE TRAVELERS INDEMNITY COMPANY, as Assignee of Judgments against Midstate Constructors, Inc. to enforce certain Judgments,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review.

Is a state court action properly removed to federal district court under the "artful pleading doctrine" and dismissed on *res judicata* grounds, where the state court pleading alleges all the elements of a cause of action under the Racketeer Influenced and Corrupt Organizations Act, alleges transactions and occurrences previously alleged in a dismissed federal court RICO action, and demands relief for damages previously alleged in the dismissed RICO action?

For a state court action to be removed under the "artful pleading doctrine," is it necessary that the elements of the state court claim be "virtually identical" to the elements of a previously dismissed federal claim, as held by the Second Circuit in this case, or is it sufficient that the state court plaintiff previously brought its claim in federal court, as held by the Ninth Circuit in *Salveson v. Western States Bankcard Association,* 731 F.2d 1423 (1984)?

Parties to the Proceeding and Rule 28.1 Statement.

The parties to the proceeding below were Petitioners George Sarkisian, John Sarkisian, Norman Preskitt, Sarco Industries, Inc., Charlotte Street Builders, Inc., Sarkisian Brothers, Inc., and Respondent, The Travelers Indemnity Company.

The following corporations are subsidiaries of Petitioner Sarco Industries, Inc.: Midstate Precast Systems, Inc., Charlotte Street Builders, Inc., Florence Street Mechanical & Electrical, Inc., C.H. Leavell & Co., Inc., JGS Construction Services, Inc. and Midstate Constructors, Inc.

The following corporations are affiliates of Petitioner Charlotte Street Builders, Inc.: Midstate Precast Systems, Inc., Florence Street Mechanical & Electrical, Inc., C.H. Leavell & Co., Inc., JGS Construction Services, Inc. and Midstate Constructors, Inc.

Petitioner Sarco Industries, Inc. is the parent corporation of Petitioner Charlotte Street Builders, Inc.

The Corporate Petitioners have no other parent companies, subsidiaries, or affiliates to list under Rule 28.1.

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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986.

GEORGE SARKISIAN, JOHN SARKISIAN, NORMAN PRESKITT, SARCO INDUSTRIES, INC., CHARLOTTE STREET BUILDERS, INC., and SARKISIAN BROTHERS, INC.,

Petitioners,

v.

THE TRAVELERS INDEMNITY COMPANY, as Assignee of Judgments against Midstate Constructors, Inc., to enforce certain Judgments,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioners George Sarkisian, John Sarkisian, Norman Preskitt, Sarco Industries, Inc., Charlotte Street Builders, Inc. and Sarkisian Brothers, Inc. respectfully pray that a

writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on June 19, 1986.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is not yet reported, and is reprinted in the Appendix hereto, p. 1a, *infra*.

There was no memorandum decision of the United States District Court for the Northern District of New York (Munson, Ch.J.). the order of the said Court is reprinted in the Appendix hereto, p. 19a, *infra*.

Jurisdiction.

Invoking removal jurisdiction under 28 U.S.C. §§ 1441 and 1331, Petitioners removed this proceeding to the United States District Court for the Northern District of New York, which denied Respondent's motion to remand and granted summary judgment dismissing Respondent's action by order dated November 2, 1985.

On Respondent's appeals, the Second Circuit on June 19, 1986 entered judgment and rendered an opinion reversing the Northern District's judgment and remanding with instructions to remand to state court. No rehearing was sought.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved.

28 U.S.C. §1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. §1441.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

Statement of the Case.

Respondent, a bonding company, commenced an action against certain of its bonding clients[1] under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* (1970), in the United States District Court for the Northern District of New York.[2]

[1]The RICO defendants included Petitioners George Sarkisian, John Sarkisian, Norman Preskitt, Sarkisian Brothers, Inc. and Sarco Industries, Inc. Respondent alleged in the RICO complaint that Sarkisian Brothers, Inc. had changed its name to Charlotte Street Builders, Inc. It is submitted that Charlotte St. Builders, Inc. was also a RICO defendant.

[2]Respondent's RICO action and the instant action are two in a series of attempts by Respondent to recover for portions of the same claim.

(Footnote continued on following page.)

Respondent's RICO complaint alleged that its damages "arose from bankrupty fraud," partly in connection with the bankruptcy of Midstate Constructors, Inc., a Texas corporation alleged to be controlled by the RICO defendants.

The RICO complaint claimed that the RICO defendants had "entered into a scheme and conspiracy to defraud creditors by use of the Bankruptcy Code." The complaint alleged that Midstate was incorporated with "substantially no assets," that Midstate undertook construction contracts without sufficient capital or equipment to perform the work, and that prior to Midstate's bankruptcy, all or substantially all monies owed to or received by Midstate were deposited to the credit of Petitioner Sarco Industries, Inc.

The RICO complaint went on to allege that the deposits resulted in transfers of funds to "affiliated companies"

(Footnote continued.)

In August 1981, Respondent removed an action brought by some of the Petitioners to the District Court for the Northern District of New York, and commenced its own diversity action in that court against the same parties. These two actions were consolidated.

In February 1983, Respondent unsuccessfully moved for partial summary judgment in the consolidated cases, seeking to recover for a portion of its claim in the instant action.

In August 1983, Respondent commenced its RICO action, which was dismissed on November 5, 1984.

Within a few weeks, Respondent moved in the consolidated cases for leave to amend its complaint there to add Petitioner Norman Preskitt as a party and to assert claims Respondent characterized as arising under New York's Debtor and Creditor law, New York and Texas statutes prohibiting "illegal payments by a corporation" and the doctrine of "piercing the corporate veil". Respondent's motion to amend was denied on the basis that the proposed amendments were effectively the same allegations as the dismissed RICO action.

Following this string of failures in federal court, Respondent subsequently commenced the instant action in state court.

and rendered Midstate unable to complete its projects, leading to claims on Respondent as surety, including claims by project owners.[3]

The damages alleged by Respondent in the RICO action were said to result from Midstate's failure to complete projects and pay suppliers on construction projects for which Respondent had issued performance and payment surety bonds.

The RICO defendants successfully moved for summary judgment dismissing the amended RICO complaint. The Northern District's judgment dismissing the RICO action was affirmed by the Second Circuit in an unpublished opinion relying principally on its opinion in *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (1984), which had not yet been overruled by this Court.

Rather than petitioning for certiorari, Respondent commenced the instant action against some of the RICO defendants in New York Supreme Court, alleging that "the Sarkisians" incorporated Midstate Constructors, Inc. with $1000.00 in capital, that Midstate owned substantially no physical assets, that Midstate entered into $20 million in construction contracts, and that checks payable to Midstate were transferred to Sarco Industries, Inc. or deposited to Sarkisian Brothers, Inc., with the in-

[3]Respondent's Amended RICO complaint alleged both bankruptcy fraud and mail fraud and set forth substantially the same allegations regarding Midstate Constuctor, Inc., including allegations that it was incorporated with $1000.00 in capital, that it entered into contracts for millions of dollars of construction work, that it had neither sufficient capital nor sufficient equipment to complete the work, that prior to its bankruptcy, monies owed to or received by it were deposited to the account of Sarco, with the result that it was unable to complete project, causing claims to be made on Respondent's surety bonds.

tent to defraud creditors, rendering Midstate insolvent. Respondent's state court pleading further alleged Midstate's bankruptcy. Respondent's state court pleading also alleged that judgments had been rendered against Midstate and assigned to Respondent. It appears from attachments to Respondent's state court petition that the most substantial of these judgments were rendered in favor of construction project owners.[4]

Petitioners removed the instant action to the District Court and successfully moved for summary judgment on *res judicata* grounds. Respondent's motion to remand was denied by the District Court.

On appeal, the Second Circuit held that removal jurisdiction was lacking, based on its interpretation of this Court's opinion in *Federated Department Stores, Inc., v. Moitie,* 452 U.S. 494 (1981).

The Second Circuit read the last two paragraphs of the *Federated Stores* opinion as establishing that the unfair competition, fraud and restitution claims in that case were state law claims, leaving only the civil conspiracy claim as the federal claim on which removal was based. 12a, *infra.*

Reasoning from its conclusion that only the civil conspiracy claim was federal, the Second Circuit then derived a two part test to determine when a claim purporting to rely on state law is an artfully pleaded federal claim. 13a, *infra.* The first criterion identified by the Second Circuit is that "the elements of the claim [are] virtually identical to those of a claim expressly grounded on federal law." 13a, *infra.* The second criterion identified by the Second Cir-

[4]Attachments to pleadings become part of the pleadings "for all purposes" under New York practice. N.Y. Civ. Prac. Rule 3014.

cuit is that the state court plaintiff "had previously elected to proceed in federal court." 13a, *infra*.

In applying its two part test to this case, the Second Circuit stated that it had "no doubt that [Respondent's] state court complaint satisfied the second criterion since the complaint was filed after [Respondent] had previously elected to bring a similar claim in federal court under RICO." 14a, *infra*.

However, the Second Circuit held that the first criterion was not met because "the elements of the state law claims are not virtually identical to those previously pled under RICO." 14a, *infra*. In particular, the Second Circuit held that the elements of Respondent's claims did not include "a pattern of racketeering activity"[5] or operation of an "enterprise."[6] 15a, *infra*.

[5]"Racketeering activity" is defined to include "any act which is indictable under . . . [18 U.S.C.] section 1343 (relating to wire fraud)" and "any offense involving bankruptcy fraud." 18 U.S.C. §1961(1)(B) and (D). Two such acts constitute a "pattern". 18 U.S.C. §1961(5).

Respondent's state court pleading alleges numerous transfers of funds from Midstate which "rendered Midstate insolvent" and which were made "with actual intent to defraud creditors." The state court pleading alleges that Petitioners controlled Midstate and that Midstate has been adjudicated a bankrupt. Accordingly, Respondent's pleading in the instant action does allege offenses involving bankruptcy fraud. *Cf.* 18 U.S.C. §152.

Two of the transfers were alleged to be "wire transfers". *Cf.* 18 U.S.C. §1343. A wire transfer of funds is sufficient to indict under 18 U.S.C. §1343. *United States v. Johnson,* 713 F.2d 633 (11th Cir. 1983), *cert. denied,* 465 U.S. 1081 (1984).

Further, Respondent's allegations of transfers of checks from a Texas corporation to a New York corporation, deposited into a New York bank, can fairly be read as alleging mail fraud, another predicate act under RICO. 18 U.S.C. §1961(1)(B).

[6]An enterprise is defined to include any corporation and any "union or group of the individuals associated in fact". 18 U.S.C.

(Footnote continued on following page.)

Reasons for Granting the Writ.

I. The Second Circuit's opinion misinterprets this Court's opinion in *Federated Stores* and is in conflict with it.

The Second Circuit derived its two-part test based on its conclusion that this Court had held only one of the claims in *Federated Stores* sufficiently federal to support removal. 12a, *infra*.

In fact, this Court clearly indicated that more than one of the claims in *Federated Stores* were federal claims, sufficient to support removal. *Federated Stores, supra,* 452 U.S. at 397 n.2, 402.[7]

Thus, the Second Circuit's two-part test, which it calls "the test of *Federated Stores,*" is in fact based on a misinterpretation of *Federated Stores*. 15 a, *infra*.

(Footnote continued.)
§1961(4). Three of the Petitioners are corporations. The three individual Petitioners are alleged to serve together as members of the boards of directors and as officers of the corporate Petitioners and of Midstate.

Since the state court complaint alleged that Midstate's activities in Texas were controlled by Petitioners from their offices in New York, thereby supplying the interstate commerce element, the Respondent did plead a RICO cause of action.

[7]The Second Circuit's conclusion that only one claim was "necessarily identified" as federal is apparently based on the last sentence of the next-to-last paragraph of the *Federated Stores* opinion. 12a and 11.7, *infra*. It seems clear that the sentence in question was a recitation of the Respondent's view, not this Court's view, that three of the four claims in *Federated Stores* were state law claims.

Certainly, the Ninth Circuit understood that this Court had not held that three of the four *Federated Stores* claims were state law claims. On remand, the Ninth Circuit held that it was the law of the case that all of the claims were federal claims. *Brown v. Federated Department Stores, Inc.*, 653 F.2d 1266, 1267 (1981).

The Second Circuit's opinion is in conflict with *Federated Stores* as a result of this misinterpretation.

In *Federated Stores,* this Court held that where the allegations in a state court complaint are "*similar*" *to* those in a previously dismissed federal court complaint, and where review and analysis of the "origins and substance" of the two complaints showed that the plaintiff had tried to avoid removal by artfully pleading essentially federal claims as state law claims, the finding of a district court that a plaintiff has attempted to avoid removal jurisdiction through artful pleading would not be questioned. 452 U.S. at 397 and n.2.

In this case, the Second Circuit acknowledged that Respondent had previously brought "a similar claim in federal court under RICO." 14a, *infra.* The Second Circuit also acknowledged that this action "contains claims related to the claim in the dismissed RICO suit." 3a-4a, *infra.* The Second Circuit's recitation of the background of this action leaves no doubt that the origins and substance of Respondent's claims in the RICO action and this action are identical. 3a-6a, *infra.*

Nonetheless, the Second Circuit reversed the District Court's order denying remand.[8]

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[8]It is unclear whether the Second Circuit reversed on the law or on the facts. In a footnote, Second Circuit did state that ". . . *even if* the clearly erroneous standard applies," it was left with a definite and firm conviction that a mistake had been committed. 14a-15a n.9, *infra.* However, from the body of the opinion, it seems that the "mistake" about which the Second Circuit had its conviction was a mistake of law, not a mistake of fact. Since the Second Circuit apparently reversed on the law, its opinion would seem to be obvious and irreconcilable conflict with *Federated Stores, supra,* 352 U.S. at 397 n.2.

The opinion below cannot be reconciled with *Federated Stores* given the Second Circuit's acknowledgment that the claims were "similar" and "related," and given the clear identity of the origins and substance of the claims.

II. The Second Circuit's opinion is in conflict with an opinion of the Ninth Circuit on the application of the artful pleading doctrine to a state court complaint which realleges matters previously litigated in federal courts.

There is a clear conflict between the Second Circuit's opinion in this case and the Ninth Circuit's opinion in *Salveson v. Western States Bankcard Association,* 731 F.2d 1423 (1984), regarding application of the artful pleading doctrine to state court complaints which reallege matters previously litigated in federal courts.

In *Salveson,* the Ninth Circuit held that "the conclusion of artful pleading is properly drawn when the plaintiff 'by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one.' " *Salveson, supra,* 731 F.2d at 1429, quoting *Salveson v. Western States Bankcard Association,* 525 F. Supp. 566, 577 (N.D. Cal. 1981). In short, the Ninth Circuit has held that once a Plaintiff has sued a claim in federal court, that claim is then "federalized" for removal purposes.

By contrast, the Second Circuit has held that the prior filing of a similar and related claim in federal court, based on the same transactions and occurrences as a subsequent state court complaint, is not a sufficient condition for removal under the artful pleading doctrine. The Second Circuit requires, in addition to prior filing of a federal court complaint, that the elements of the state law claims

be "virtually identical" to those previously pled in the federal action. 13a, *infra*.

Further, there is no question that the Ninth Circuit considers a "claim" for purposes of the artful pleading doctrine, as identical with a "claim" for preclusion purposes.

> Justice Rehnquist's opinion in *Moitie* was primarily concerned with the *res judicata* aspect rather than with the jurisdictional elements which confront us as a consequence of the district court's treatment of Salveson's case. However, critical in both *res judicata* and artful pleading considerations was the fact that appellant Brown had previously filed the claims as federal claims in federal court. Having done so, he could not be permitted to recast the same claims as state claims to the prejudice and detriment of the defendant. Avoidance of such untoward results is the proper function of the doctrine of *res judicata. Salveson, supra,* 731 F.2d at 1429.

By contrast, as the Second Circuit itself acknowledged, the Second Circuit has defined a claim for artful pleading purposes more narrowly than for preclusion purposes. 15a, n.10, *infra*. As a result, a state court complaint subject to dismissal on *res judicata* grounds based on a prior federal court judgment is removable in the Ninth Circuit, but not in the Second.

Further, the Ninth Circuit in *Salveson* clearly treated the artful pleading inquiry as factual in nature. 731 F.2d at 1429. As shown in n. 8, *supra,* the Second Circuit appears to treat the artful pleading inquiry as a legal rather that a factual question. 14a-15a, n.9, *infra*.

III. The lower federal courts and leading commentators have expressed confusion over the scope of the artful pleading doctrine since *Federated Stores*. Because district court orders of remand are generally not reviewable, it is particularly important that this Court settle the proper application of the artful pleading doctrine.

It is apparent that the lower federal courts need guidance in interpreting and applying the artful pleading doctrine in the light of footnote 2 of the *Federated Stores* opinion. The Second Circuit's opinion in this case acknowledges that the scope of the artful pleading doctrine was "rendered uncertain" by the decision in *Federated Stores.* 10a, *infra.*

Three federal district courts have also indicated that uncertainty exists over the scope of the artful pleading doctrine after *Federated Stores. Reid v. Walsh,* 620 F. Supp. 930, 933 (M.D. La. 1985); *Gold v. Blinder, Robinson & Co., Inc.,* 580 F. Supp. 50, 53 n. 1 (S.D.N.Y. 1984); *Magic Chef, Inc. v. International Molders & Allied Worker's Union,* 581 F. Supp. 772, 776 n. 4 (E.D. Tenn. 1983). In fact, one court has stated that "it seems proper, absent more direct and fuller consideration of the issue by the Court, to view the result [in *Federated stores*] as an aberration . . ." *Gold, supra,* 580 F. Supp. at 43 n.1.

This uncertainty among the district courts presents a particularly compelling reason for granting the writ, since non-final orders denying remand are not immediately appealable, and orders granting remand are generally not reviewable at all. 28 U.S.C. §§ 1291, 1292 and 1447(d). For practical purposes, the district courts may often have the last say on the inportant jurisdictional issue presented here.

The need for clarification from this Court is underscored by the inability of leading commentators to explain the scope of the artful pleading doctrine after *Federated Stores*. One treatise has called the decision "anamolous." 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3722, at 305 n.108 (2d ed. 1985). Another has called it "mystifying" and has stated explicitly that it has caused "uncertainties" about the law of removal. C. Wright, *The Law of Federal Courts* §38 at 212 n.19 and 215 n.41 (4th ed. 1983).[9]

Conclusion.

For the reasons set forth above, the Petition should be granted.

Respectfully submitted,

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[9]*See also* Note, *Removal Doctrine Reaffirmed: Franchise Tax Board v. Construction Laborers Vacation Trust*, 70 Cornell L. Rev. 557, 561 n. 27 (1985) (*Federated Stores* opinion "provides little guidance" as to the scope of the artful pleading doctrine) *and* Note, *Federated Department Stores v. Moitie: A Radical Departure From Traditional Removal Jurisdiction or an Aberration*, 43 U. Pitt. L. Rev. 1165, 117415 (1982).

Appendix I—Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 777, 796, 818—August Term 1985

Argued: January 29, 1986 Decided: June 19, 1986

Docket Nos. 85-7935, -7937, -7939

THE TRAVELERS INDEMNITY COMPANY,

Plaintiff-Appellant,

—v.—

GEORGE K. SARKISIAN, JOHN SARKISIAN, NORMAN PRESKITT, IVY MECHANICAL & ELECTRICAL ASSOCIATES, INC., SARKISIAN BROTHERS, INC., SARCO INDUSTRIES, INC., SARBRO EQUIPMENT CORP., and JOHN DOE and RICHARD ROE, said names being fictitious but meant to designate the officers, employees and/or agents of the aforesaid defendants, presently unknown to the Plaintiff, who participated in the acts set forth herein,

Defendants-Appellees.

THE TRAVELERS INDEMNITY COMPANY, as Assignee of Judgments Against MIDSTATE CONSTRUCTORS, INC., to Enforce Certain Judgments,

Petitioner-Appellant,

—v.—

GEORGE SARKISIAN, JOHN SARKISIAN, NORMAN PRESKITT, SARCO INDUSTRIES, INC., CHARLOTTE STREET BUILDERS, INC., and SARKISIAN BROTHERS, INC.,

Respondents-Appellees.

Before:

NEWMAN, KEARSE, and MINER,
Circuit Judges.

Appeals from an order (No. 85-7935) and a judgment (Nos. 85-7937 and 85-7939) of the District Court for the Northern District of New York (Howard G. Munson, Chief Judge). The order denied a Rule 60(b) motion to vacate dismissal of a RICO claim; the judgment sustained a *res judicata* defense to claims allegedly based on state law and removed to federal court under the doctrine of "artful pleading."

Order denying the Rule 60(b) motion affirmed. Judgment reversed and case remanded with directions to remand to state court.

LESLIE COUCH, Albany, N.Y. (Sharon Couch DeBonis, Couch and Howard, Albany, N.Y., on the brief), *for plaintiff-petitioner-appellant.*

ALAN J. POPE, Binghamton, N.Y. (Thomas M. Christina, Ball & McDonough, Binghamton, N.Y., on the brief), *for defendants-respondents-appellees.*

JON O. NEWMAN, *Circuit Judge*:

These related but unconsolidated appeals primarily concern the esoteric doctrine of "artful pleading." Specifically, we consider whether the circumstances permit a state court defendant to remove a case to federal court on the theory that a complaint purporting to rely solely on state law in reality contains federal claims artfully pled. In No. 85-7935, Travelers Indemnity Company ("Travelers") appeals from an order of the District Court for the Northern District of New York (Howard G. Munson, Chief Judge) denying its Rule 60(b)(6) motion for relief from a 1984 judgment that dismissed a civil RICO suit.[1] In No. 85-7937, Travelers appeals from a 1985 judgment of the Northern District that dismissed on *res judicata* grounds a suit, removed from state court, that contains

1 Defendants-appellees in No. 85-7935 are George K. Sarkisian, John Sarkisian, Norman Preskitt, Ivy Mechanical & Electrical Associates, Inc., Sarkisian Brothers, Inc., Sarco Industries, Inc., Sarbro Equipment Corp., and John Doe and Richard Roe (fictitious names designating officers, employees, and agents of the above defendants unknown to plaintiff).

claims related to the claim in the dismissed RICO suit.[2] For reasons that follow, the order in No. 85-7935 is affirmed, and the judgment in No. 85-7937 is reversed and remanded with instructions to remand the case to state court.

I. Background

Travelers was the surety on certain payment and performance bonds issued on behalf of Midstate Constructors, Inc. ("Midstate"), a Texas corporation that performed construction work in the Southwest. Midstate defaulted on obligations to owners and contractors. The Texas state courts rendered three judgments against Midstate totalling $3,236,588.20. Travelers satisfied these judgments as surety, and the prevailing plaintiffs assigned their claims against Midstate to Travelers. Because Midstate was the subject of a Chapter VII bankruptcy proceeding, Travelers sought others it could hold liable for Midstate's debts.

On August 4, 1981, certain parties who had agreed to indemnify Travelers against liabilities arising from the Midstate payment and performance bonds commenced an action in the New York courts to have the indemnity agreement declared void. On August 18, 1981, Travelers responded by commencing a diversity action in the Northern District of New York for breach of the indemnity agreement. Travelers subsequently removed the state declaratory judgment action to the Northern District of New York, and the actions were consolidated (the "consolidated actions").

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[2] Defendants-appellees in No. 85-7937 are George Sarkisian, John Sarkisian, Norman Preskitt, Sarco Industries, Inc., Charlotte Street Builders, Inc., and Sarkisian Brothers, Inc.

On August 15, 1983, Travelers filed a complaint in the Northern District, seeking relief under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (1982), against some but not all of the defendants it had sued in the consolidated actions. Travelers sought damages resulting from bankruptcy fraud and mail fraud. The first, third, fourth, and fifth causes of action alleged that defendants had fraudulently diverted assets from two insolvent corporations, Midstate and Ivy Mechanical & Electrical Associates, Inc. ("Ivy"), for whom Travelers was surety. The second cause of action alleged mail fraud based on false representations made by Midstate to obtain payments from owners. The sixth cause of action alleged fraud in connection with the filing of Ivy's bankruptcy petition. The District Court dismissed the RICO complaint on the authority of *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), and this Court affirmed by order on April 12, 1985. Travelers did not petition for certiorari. After the Supreme Court reversed *Sedima*, 105 S. Ct. 3275 (1985), Travelers moved in the District Court, pursuant to Fed. R. Civ. P. 60(b)(6), for relief from the judgment. The District Court denied the motion. No. 85-7935 is Travelers' appeal from this denial.

In August 1983, Travelers filed a complaint ("petition" in New York practice) in a special proceeding in New York Supreme Court against some but not all of the defendants in the civil RICO action. Travelers sought to hold defendants liable for Midstate's debts to it on state law theories of fraudulent conveyance, piercing the corporate veil, unlawful payment of dividends, and unlawful salary payments. Travelers also sought attorney's fees. Defendants removed this action to federal court on federal question

grounds on the theory that the state law claims were in substance a RICO claim, artfully pled. Travelers moved for a remand to state court, and defendants moved for summary judgment on the ground that the dismissal of the prior RICO action was *res judicata*. The District Court denied Travelers' motion to remand and granted defendants' summary judgment motion. In No. 85-7937 Travelers seeks review of both rulings of the District Court.[3]

II. Rule 60(b)(6)

A district court may grant relief from an otherwise final judgment for any of five enumerated reasons or for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). Travelers argues that it is entitled to relief from the RICO judgment based on the Supreme Court's reversal of *Sedima*. However, it is well settled that a change in decisional law is not grounds for relief under Rule 60(b)(6). *Ackermann v. United States*, 340 U.S. 193 (1950); *Loucke v. United States*, 21 F.R.D. 305 (S.D.N.Y. 1957).[4] *Ackermann* affirmed the

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3 Travelers needlessly filed two notices of appeal, attempting to appeal issue by issue. In No. 85-7937, it challenges the District Court's remand ruling. In No. 85-7939, it challenges the District Court's *res judicata* ruling. Since only one appeal will lie from the final judgment, the appeal in No. 85-7939 is dismissed, and Travelers' challenge to the *res judicata* ruling is incorporated into the appeal in No. 85-7937.

4 Travelers might have based its motion for relief on the third clause of Rule 60(b)(5) on the ground that "it is no longer equitable that the judgment should have prospective application." A change in decisional law is cognizable under Rule 60(b)(5). *United States v. Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 952 (1982); *Jordan v. Erie School District*, 548 F.2d 117 (3d Cir. 1977); *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975). However, it is doubtful that the preclusive nature of a dismissal with prejudice is a prospective effect under the rule. *See Gibbs v. Maxwell House*, 738 F.2d 1153 (11th

denial of Rule 60(b)(6) relief to a party who failed to appeal an adverse judgment and then relied on the reversal of a similar judgment in a related case. Since *Ackermann* squarely governs the instant controversy, the order in No. 85-7935 is affirmed.

III. Removal

A. Artful Pleading

In No. 85-7937, Travelers argues that its state court suit relies solely on state law for relief and therefore does not "aris[e] under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331 (1982), and is not removable under 28 U.S.C. § 1441(a) (1982).[5] Normally, removal based on federal question jurisdiction is improper unless a federal claim appears on the face of a well-pleaded complaint. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Gully v. First National Bank*, 299 U.S. 109 (1936); *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908). It has been the law for decades that "the party who brings a suit is master to decide what law he will rely upon . . . ." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). "[W]here plaintiff's claim involves

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Cir. 1984). *But see Kirksey v. City of Jackson*, 714 F.2d 42 (5th Cir. 1983). In any event, if Travelers had filed a timely petition for certiorari, the petition surely would have been granted and the case summarily remanded to this Court for reconsideration in light of *Sedima*. *See Hoffman v. Eti-Quette Assaf Ltd.*, 106 S. Ct. 517 (1985); *Joel v. Cirrito*, 105 S. Ct. 3550 (1985). Since Travelers had ample opportunity to protect itself on direct review, it is not inequitable for the judgment to continue to have prospective application.

5 Although there is complete diversity among the parties, defendants are citizens of New York, the forum state, and therefore cannot remove the case on diversity grounds. 28 U.S.C. § 1441(b) (1982).

both a federal ground and a state ground, the plaintiff is free to ignore the federal question and pitch his claim on the state ground" to defeat removal. 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.160, at 185 (2d ed. 1979); *see Vitarroz Corp. v. Borden, Inc.*, 644 F.2d 960, 964 (2d Cir. 1981).

However, in certain limited circumstances a plaintiff may not defeat removal by clothing a federal claim in state garb, or, as it is said, by use of "artful pleading." In the words of a leading treatise,

> [O]ccasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization. For instance, in many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not. If the only remedy available to plaintiff is federal, because of preemption or otherwise, and the state court must necessarily look to federal law in passing on the claim, the case is removable regardless of what is in the pleading.

14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3722, at 268-75 (2d ed. 1985) (citations omitted). The classic application of the artful pleading doctrine occurs in the context of federal preemption of state law. In that circumstance a plaintiff purporting to plead a claim based on state law is necessarily relying on federal law for relief. *See Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968) (claim for breach of collective bargaining agreement cognizable only under federal Labor-Management Relations Act); *American Synthetic Rubber Corp.*

v. Louisville & Nashville Railroad Co., 422 F.2d 462 (6th Cir. 1970) (claim for negligent delivery of goods cognizable only under Carmack Amendment to Interstate Commerce Act). In its pristine form, the artful pleading doctrine is not a departure from the rule that the plaintiff is master of his complaint. If a plaintiff has pled what must necessarily be a federal claim, he has no state law available to choose as the basis for his suit. A similar but procedurally distinguishable instance of artful pleading occurs when a defendant argues not only that federal law preempts the state law on which a plaintiff relies but also that federal law provides no relief on the facts the plaintiff has alleged. In such circumstances, federal law is interposed solely as a defense, and removal jurisdiction will not lie. The plaintiff has *no* available bodies of law from which to choose. *Franchise Tax Board v. Construction Laborers Vacation Trust, supra*; *Long Island Railroad Co. v. United Transportation Union*, 484 F. Supp. 1290 (S.D.N.Y. 1980).[6]

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6 It is not immediately apparent why federal preemption, where arguable, is not always simply a defense to a complaint containing only state law claims, rather than a basis of removal on federal question grounds. *See* 1A J. Moore & B. Ringle, *Moore's Federal Practice and Procedure* ¶ 0.160[4] (2d ed. 1985). If plaintiff's state law claims are preempted, it would seem that a motion to dismiss would be granted. If the dismissal is without prejudice to amend, plaintiff may then assert the federal claims upon which he is entitled to relief, and defendant can then remove the case to federal court. Perhaps removal based on preemption is justified because the state court will usually have concurrent jurisdiction over the latent federal claims. For example, a state court would have concurrent jurisdiction over the Labor-Management Relations Act claim that supported removal in *Avco Corp. v. Aero Lodge, supra. See Amalgamated Association of Street, Electric, Railway, and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 298 (1971). If the facts alleged in the complaint necessarily entitle the plaintiff to relief under either federal or state law and the state court has concurrent jurisdiction over the federal claim, the state court might feel no obligation to decide the preemption question. Or the state court might defer resolving the preemption question until it is

The vitality of the master-of-the-complaint rule and the limited scope of the doctrine of artful pleading were both rendered uncertain by the Supreme Court's decision in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). In *Federated Stores*, seven plaintiffs brought parallel actions under section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), alleging retail price-fixing in the women's clothing industry. The District Court dismissed all seven actions on the ground that the plaintiffs had not alleged an "injury" to their "business or property" within the meaning of that section. Five of the seven plaintiffs appealed to the Ninth Circuit. Plaintiff Brown chose not to appeal and instead relied on the same facts to assert in the California state court state law claims of civil conspiracy, unfair competition, fraud, and restitution. Brown's case was removed to federal court, and the District Court, applying the artful pleading doctrine, denied Brown's motion to remand. The District Court considered Brown's state law claims "federal in nature." *See Federated Stores, supra*, 452 U.S. at 397 n.2. On the merits, the District Court held that the removed complaint was barred by *res judicata* as a result of the dismissal with prejudice of the prior Clayton Act lawsuit.

Brown appealed the dismissal of the removed complaint to the Ninth Circuit. While this appeal was pend-

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satisfied that plaintiff has proved his claim. If the state claim is preempted, the state court can then deem the pleadings amended to assert a federal claim and render judgment for plaintiff. If the state court defers deciding the preemption question in this fashion, assertion of any federal claim will come too late to allow removal. However, the artful pleading doctrine has been extended to claims which, once deemed federal, are within the exclusive jurisdiction of federal courts. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (antitrust claim); *In re Snap-On Tools Corp.*, 720 F.2d 654 (Fed. Cir. 1983) (patent claim).

ing, the Supreme Court held, in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), that retail purchasers may sue under section 4 of the Clayton Act for injury to their business or property. In light of *Reiter*, the Ninth Circuit reversed and remanded the five Clayton Act cases that had been appealed. In deciding Brown's appeal, the Ninth Circuit held that Brown's second lawsuit was properly removed but that, despite his failure to appeal dismissal of his Clayton Act suit, *res judicata* should not be applied in light of the reversals in the five companion cases in which appeals were successfully taken. The Supreme Court reversed the *res judicata* holding and devoted most of its opinion to that issue. The Court approved the removal in footnote 2, noting without elaboration that "at least some of the claims had a sufficient federal character to support removal" under the artful pleading doctrine. *Federated Department Stores, Inc. v. Moitie*, *supra*, 452 U.S. at 397 n.2.

Unquestionably, *Federated Stores* made some alteration of the master-of-the-complaint rule. Even though Brown had pled in state court claims grounded on state law that were not preempted by federal law, *cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), the Supreme Court considered at least some of his claims to be federal claims, artfully pled. How far beyond the preemption context the Court intended to extend the artful pleading doctrine depends upon its rationale for deeming Brown's state law claims to be in reality federal claims. Unfortunately, the footnote approving the removal provides little illumination. Two questions need to be answered: (1) which of Brown's state law claims were sufficiently federal to permit removal, and (2) what was the reason for considering them to be federal?

The first question was pointedly asked in Justice Brennan's dissenting opinion, 452 U.S. at 409, and evoked no explicit response in the majority opinion. The question was pertinent in determining the scope of the holding, since the Court ruled that the "federal" claims, whichever they were, were barred by *res judicata*. It seems clear that the Court did not consider all of Brown's state law claims to be federalized since it left to the Ninth Circuit on remand the task of deciding whether or not *res judicata* also barred the unfederalized state law claims.

The strongest indication of which claims the majority thought were federal is found in the last two paragraphs of the Court's opinion. The majority there identified Brown's contention that the dismissal of his prior federal court suit cannot preclude the "additional state-law claims" not decided in that suit "such as unfair competition, fraud, and restitution." 452 U.S. at 402. The Court declined to rule on this contention, leaving it for consideration by the Ninth Circuit on remand. A reasonable inference is that the claims of unfair competition, fraud, and restitution, even if ultimately determined by the Ninth Circuit to be barred by *res judicata*, were not the "federal" claims that justified removal. That leaves only Brown's claim of civil conspiracy, which must necessarily have been the "federal" claim that justified removal.[7]

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[7] We note that on remand in *Federated Stores*, the Ninth Circuit read the Supreme Court's opinion to leave to the Court of Appeals the task of determining which claims were sufficiently federal to have justified removal and hence to be barred by *res judicata* under the Supreme Court's holding. *Brown v. Federated Department Stores, Inc.*, 653 F.2d 1266 (9th Cir. 1981). The Ninth Circuit concluded that all four claims were federal claims, artfully pled. For the reasons stated above, we think the Supreme Court necessarily identified only Brown's civil conspiracy claim as the "federal" claim that justified removal. Moreover, we think it unlikely that the Court would have upheld removal jurisdiction without having in mind a specific claim that justified

Since the civil conspiracy claim was the artfully pled claim, we can identify two criteria that will help us to understand why that claim was considered to be federal. First, the elements of the claim were virtually identical to those of a claim expressly grounded on federal law. The civil price-fixing conspiracy Brown alleged was a conspiracy to violate California's antitrust laws, Cal. Bus. & Prof. Code §§ 16720, 16726 (West 1964), which parallel federal laws in pertinent respects. *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co.*, 4 Cal. 3d 354, 482 P.2d 226, 93 Cal. Rptr. 602 (1971) (in banc); *Rosack v. Volvo of America Corp.*, 131 Cal. App. 3d 741, 182 Cal. Rptr. 800 (1982). However, if substantial identity between the elements of a state and a federal claim sufficed to deny a pleader the right to pitch his claim on state law and remain in state court, then *Federated Stores* would overrule *The Fair v. Kohler Die & Specialty Co.*, *supra*, and its progeny, a result unlikely to have been intended by the brief discussion of removal in footnote 2. A far more narrow reading of *Federated Stores* results if we identify as the second criterion that rendered Brown's claim "federal" the fact that he had previously elected to proceed in federal court. Brown had an initial opportunity to be master of his price-fixing claim and elected to assert it under the Clayton Act in federal court. Having done so and having forgone the opportunity to plead a pendent state law claim, he was

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removal. We also note that the Ninth Circuit apparently recognized the possibility that only the civil conspiracy claim was the federal claim artfully pled, since it ruled, alternatively, that any of Brown's claims that remained as state law claims were in any event barred by *res judicata*, notwithstanding that these claims, if pleaded as pendent claims in the original federal lawsuit, might have been dismissed without adjudication upon the dismissal of the federal claim. *Id.* at 1267.

not free to abuse the dual court system by filing in state court a second lawsuit and resubmitting his claim as one based solely on state law. This interpretation of *Federated Stores* limits but does not abolish the master-of-the-complaint rule and has found favor elsewhere. *See Salveson v. Western States Bankcard Association*, 525 F. Supp. 566 (N.D. Cal. 1981), *aff'd on this ground*, 731 F.2d 1423 (9th Cir. 1984).[8]

Applying the foregoing criteria in reverse order, we have no doubt that Travelers' state court complaint satisfies the second criterion since the complaint was filed after Travelers had previously elected to bring a similar claim in federal court under RICO. However, we conclude that the state court complaint does not satisfy the first criterion since the elements of the state law claims are not virtually identical to those previously pled under RICO.[9] Even though both the federal and state suits

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8 *Salveson* also suggested, as an additional rationale for removal in *Federated Stores*, that "the effect of permitting Brown to prosecute the same claims under state law in the second action would have been to impair the ability of defendants to assert the federal *res judicata* defense against those claims." *Salveson v. Western States Bankcard Association*, *supra*, 525 F. Supp. at 575. However, if Brown's case had been remanded to state court, the *res judicata* effect of the prior federal question suit would still have been governed by federal law. *See Limbach v. Hoover & Allison Co.*, 466 U.S. 353, 361-62 (1984); *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938); *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903); 8 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4468 (1981); *see also Restatement (Second) of Judgments* § 87 (1981) (federal law governs *res judicata* effect of all federal judgments, including those in diversity cases).

9 The Supreme Court has suggested that the artful pleading inquiry is factual in nature, *see Federated Department Stores, Inc. v. Moitie*, *supra*, 452 U.S. at 397 n.2, and one Circuit has applied the clearly erroneous standard to review of such an inquiry, *see Salveson v. Western States Bankcard Association*, 742 F.2d 1423, 1429 (9th Cir. 1984). Although it would seem that characterization of a plaintiff's claims presents a purely legal question, *see Federated Department*

sought to hold certain defendants liable for Midstate's debts as a consequence of illegal diversion of Midstate's assets, the elements of Travelers' state law claims do not include "a pattern of racketeering activity" or operation of an "enterprise," which are elements of the RICO claim, 18 U.S.C. § 1962. A federal jurisdictional element, such as effect on interstate commerce, would not serve to distinguish state and federal claims for purposes of removal under *Federated Stores*, but the RICO elements not required for claims that suffice under New York law have significant substantive content. Though the state and federal claims arose out of the same nucleus of operative facts, that circumstance does not satisfy the test of *Federated Stores*, since it was true of all the claims in that litigation, and three of them were deemed to be properly pled state law claims.[10] The doctrine of artful pleading may therefore not be invoked to deem Travelers' state law claims to be "federal" claims and thereby justify removal.

B. Other Grounds for Removal

Appellees seek to defend the judgment in No. 85-7937 on the alternative ground that Travelers' state court

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Stores, Inc. v. Moitie, *supra*, 452 U.S. at 409 & n.5 (Brennan, J., dissenting), we reverse the District Court because, even if the clearly erroneous standard applies, we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

10 We recognize that our holding has the effect of defining a "claim" more narrowly for artful pleading purposes than for preclusion purposes. However, to hold that a plaintiff's state law claim will be recharacterized as a federal claim whenever it arises out of the same transaction as a prior federal claim would lead to the anomalous result that a case is removable under *Federated Stores* only if the defendant has a successful *res judicata* defense under federal law. This approach would seem to violate the well-established rule that removal jurisdiction may not rest on a federal defense.

complaint is removable because there are federal ingredients to Travelers' state law claims. To prevail on its state law claims, Travelers must establish that Midstate is liable to it and that defendants, by unlawfully diverting Midstate's assets, are responsible for Midstate's debts. Appellees argue that Travelers' state claims contain three federal ingredients: (1) New York law grants Travelers an action on the Texas judgments against Midstate only to the extent that the Texas judgments are entitled to full faith and credit under the Constitution, (2) federal law dictates the law New York must apply in determining defendants' liability for Midstate's debts, and (3) the Due Process Clause of the Fourteenth Amendment limits Travelers' ability to enforce the Texas judgments.

Normally, a case "arises under" federal law, 18 U.S.C. § 1331 (1982), if federal law creates plaintiff's cause of action. *See American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). The Supreme Court has also allowed federal jurisdiction for state-created claims that involve construction of federal law, *see Smith v. Kansas Title & Trust Co.*, 255 U.S. 180 (1921); *Hopkins v. Walker*, 244 U.S. 486 (1917), but only if the federal element is substantial. *See Gully v. First National Bank*, *supra*; *Shulthis v. McDougal*, 225 U.S. 561 (1912). The Court has excluded state-created claims with only a minor, technical federal element. For example, an action to establish title to land does not arise under federal law merely because, as part of his case, plaintiff must trace his title back to an undisputed federal grant. *See Shulthis v. McDougal*, *supra*; *Joy v. City of St. Louis*, 201 U.S. 332 (1906). To hold otherwise would federalize "every action to establish title to real estate (at least in the newer states) . . . , as all titles in those states come from the

United States or by virtue of its laws." *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507 (1900). Because it would be equally anomalous to federalize every action seeking to enforce an out-of-state judgment, Travelers' state court complaint is not removable simply because the plaintiff expects compliance with the Full Faith and Credit Clause. New York law explicitly provides that foreign judgments are enforceable only to the extent required by the Full Faith and Credit Clause, N.Y. Civ. Prac. Law & R. §§ 5401, 5402 (McKinney 1972). To whatever extent New York has thereby made observance of the Full Faith and Credit Clause an element of plaintiff's cause of action, this "federal" element is too insubstantial to support federal question jurisdiction.

We also reject appellees' argument that the bearing of federal law on the choice of law issue allows removal. Appellees are incorrect when they assert that federal law determines the law New York must apply in determining their liability for Midstate's debts. New York is free to apply its own choice of law rule, subject only to the full faith and credit and due process limitations that it may not apply the law of a jurisdiction lacking a significant relation to the litigation. *See Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion); *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). The constitutional limitations form no part of Travelers' affirmative claims, and the case does not arise under federal law merely because federal law defines the "operative limits" of a state rule. *Gully v. First National Bank*, *supra*, 299 U.S. at 118.

Finally, appellees argue that Travelers may not enforce the Texas judgments unless such enforcement is consistent with due process. However, the due process issue forms no part of Travelers' affirmative claims and is properly raised as a defense to Travelers' complaint. A federal issue raised by way of defense will not support removal jurisdiction. *See, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust, supra.*

IV. *Res Judicata*

In light of our holding that the District court lacked jurisdiction over the subject matter of the complaint in No. 85-7937, we express no opinion on the *res judicata* issue.[11]

V. Conclusion

The order in No. 85-7935 is affirmed. The judgment in No. 85-7937 is reversed, and the case is remanded to the District Court with instructions to remand the case to state court.

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[11] After remand, the state court, in resolving the *res judicata* issue, will need to decide the legal significance, if any, of the lack of identity among the defendants in the RICO and the state court actions.

Appendix II—Order of the District Court.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

THE TRAVELERS INDEMNITY COMPANY,

Plaintiff,

against

GEORGE SARKISIAN, JOHN SARKISIAN, NORMAN PRESKITT, SARCO INDUSTRIES, INC., CHARLOTTE ST. BUILDERS, INC., and SARKISIAN BROTHERS, INC.,

Defendants.

Civil Action No.: 85-CV-1181

HON. HOWARD G. MUNSON

The Plaintiff, The Travelers Indemnity Company, having moved this Court to remand the above-entitled action to Supreme Court of the State of New York; and the Defendants, George Sarkisian, John Sarkisian, Norman Preskitt, Sarco Industries, Inc., Charlotte St. Builders, Inc., and Sarkisian Brothers, Inc., having moved this Court to dismiss the pleadings herein of the Plaintiff pursuant to F.R.C.P. 12(b)(6) and for Summary Judgment on

behalf of said Defendants against the Plaintiff pursuant to F.R.C.P. 56; and said Motions having come on to be heard before this Court on October 7, 1985, in Syracuse, New York; and the Court having duly considered the Petition for Removal of Civil Action, with attachments, dated August 29, 1985, the Plaintiff's Motion to Remand, dated September 16, 1985, and supporting affidavit, with attachments, of Leslie F. Couch, Esq., sworn to September 16, 1985, the Defendants' Motion to Dismiss, dated September 3, 1985, and supporting affidavit, with attachment, of Alan J. Pope, Esq., sworn to September 3, 1985, the affidavit of Leslie F. Couch, Esq., sworn to September 17, 1985, in opposition to Motion to Dismiss, the affidavit, with attachment, of Alan J. Pope, Esq., sworn to September 26, 1985, in support of dismissal and opposing remand, the respective Memoranda of Law in support and in opposition to said Motions, and the respective argument of counsel, and good cause appearing, and the Court finding that the action was properly removed to this Court by said Defendants, and that the Plaintiff is barred as a matter of law from asserting the claims herein against the Defendants, and that the Defendants are entitled to a Judgment as a matter of law, it is

ORDERED AND ADJUDGED that the Plaintiff's Motion to Remand be and the same hereby is denied in all respects; and it is

ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss and for Summary Judgment be and the same hereby is granted, and that the Petition and pleadings of the Plaintiff herein be and the same hereby are dismissed with prejudice; and it is

ORDERED AND ADJUDGED that the above-entitled action be and hereby is dismissed with prejudice, and that the Clerk of this Court be and hereby is directed to enter judgment in favor of Defendants and against the Plaintiff in accordance with this Order.

Dated: November 2, 1985
Syracuse, New York

HOWARD G. MUNSON, C.J.